

United States
COURT OF APPEALS
for the Ninth Circuit

THE UNITED STATES NATIONAL BANK
OF PORTLAND, OREGON, TRUSTEE, and
WALTER G. E. SMITH, *Appellants,*
vs.

FABRI-VALVE COMPANY OF AMERICA, a
corporation, *Appellee.*

FABRI-VALVE COMPANY OF AMERICA, a
corporation, *Appellant,*
vs.

THE UNITED STATES NATIONAL BANK
OF PORTLAND, OREGON, TRUSTEE, and
WALTER G. E. SMITH, *Appellees.*

**BRIEF FOR DEFENDANT-APPELLEE
AND CROSS-APPELLANT**

*Appeals from the United States District Court for the
District of Oregon.*

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TOPICAL INDEX

	Page
Jurisdiction	1
Statement of the Case.....	2
Analysis of the Claims.....	3
The Court's Error.....	6
The File Wrapper and Contents.....	7
Testimony of the Inventor.....	10
Comparison of Plaintiff-Appellants' Patented Valve and Defendant-Appellee's Accused Valves.....	10
Argument	12
Damages	16
Plaintiff-Appellants' Brief	19
Conclusions	21

TABLE OF AUTHORITIES CITED

	Page
American Fruit Growers v. Brogdex Co., 283 U.S. 1	
.....	14, 20
American Sulfitc Pulp Co. v. De Grasse Paper Co., C.A. 2, 193 Fed. 653	19
Carnegie Steel Co. v. Cambria Iron Co., 185 U.S. 403, 432	14, 20
Horvath v. McCord Radiator and Manufacturing Company et al., C.A. 6, 100 F. 2d 326, c. d. 308 U.S. 581, 84 L. Ed. 486	17, 19
Kemart Corp. v. Printing Arts Research Lab. Inc., 9 Cir., 201 F. 2d 624, 627, 628	15
Kwikset Locks, Inc. v. Hillgren, C.A. 9, 100 U.S.P.Q. 289 (Decided Feb. 3, 1954)	14
Lanyon v. M. H. Detrick Co., 9 Cir., 85 F. 2d 875	14
Magnavox Co. v. Hart & Reno, 9 Cir., 73 F. 2d 433	14
McLain v. Ortmayer, 141 U.S. 419	14
Muther v. United Shoe Machinery Co., 21 F. 2d 773, 775	17
Rude v. Westcott, 130 U.S. 152, 167	17
Schnitzer et al., dba Alaska Junk Company v. Cali- fornia Corrugated Culvert Company et al., C.A. 9, 140 F. 2d 275	13, 14, 20
Schriber-Schroth Co. v. Cleveland Trust Co., 311 U.S. 211	14, 20
Uihlein v. General Electric Co., C.A. 7, 47 F. 2d 997	17
United Nickel Co. v. Railroad Co., 36 Fed. 186	19
United States v. Esnault-Pelterie, 303 U.S. 26, 30	15
Walker on Patents, Deller's Edition, Section 823	18
Warren Bros. Co. v. Thompson, C.A. 9, 293 F. 745	13, 20

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JURISDICTION

The jurisdiction of the District Court in this action for patent infringement is based upon the patent laws of the United States of America (R. 4).

This Court's jurisdiction to review the Final Judgment (R. 35) arises under 28 U.S.C. §1291.

STATEMENT OF THE CASE

Plaintiff-Appellants appeal from a judgment (R. 35) awarding damages for infringement of claim 3 of the patent in suit, which was entered upon two Oral Opinions (R. 19 and R. 22) and Findings of Fact and Conclusions of Law (R. 24). The amount of damages is set forth as the error in Plaintiff's Notice of Appeal (R. 37), but in Plaintiff's Statement of Points on Appeal (R. 42) additional errors are set forth, including the Court's holding of noninfringement of claims 1, 2, 5 and 6 of the Smith patent. Defendant-Appellee filed a Notice of Appeal (R. 40) and Statement of Points on Appeal (R. 42) with respect to the Court's finding of infringement of claim 3 of the patent in suit.

The District Court for the District of Oregon held that Patent No. 2,001,271 in suit was not infringed as to claims 1, 2, 5 and 6, and was infringed as to claim 3 (R. 34). The patent in suit was issued May 14, 1935, and expired May 14, 1952, prior to conclusion of the trial. The validity of the patent was not an issue of the trial. The sole issues on appeal are infringement and the amount of damages. Claim 4 of the patent in suit has never been at issue, the charge of infringement being limited to claims 1, 2, 3, 5 and 6 (R. 19).

Two different types of valves manufactured by defendant are charged with infringement, the bonnet type (Type A) (D. Ex. D., Plate 2) and the bonnetless type (Type B) (D. Ex. D., Plate 3). These two types of valves are described in general terms in Findings VII

to X (R. 27). The valve illustrated in the patent in suit is also illustrated in D. Ex. D., Plate 1, and described in Finding VI (R. 26).

The gate valve of the patent in suit is designed particularly for use in pulp mills and more particularly for controlling the flow of pulp stock through pipelines (Finding V, R. 26). According to Finding XI (R. 29), gate valves were highly developed by the prior art more than one year prior to the filing of the application which matured into the Smith patent in suit.

ANALYSIS OF THE CLAIMS

The elements of the claims are set out below, together with appropriate comments.

1. All claims call for a "housing provided with inlet and outlet ports." It is undeniable that all valves have a housing provided with inlet and outlet ports;

2. All claims call for a "gate slidable between said ports." The gate is designated by the letter h in the patent. The gates of defendant's valves are designated by the numeral 14 in Plates 2 and 3 of D. Ex. D. Gate valves were highly developed long prior to the Smith patent;

3. All claims specify that the gate is slidable "in grooves formed in the side walls of said housing." These grooves are designated by the small letter g in the patent. In defendant's valve Type A (Plate 2) the gate is guided between a ring 15 welded to the inner surface

of the wall of the valve body on the outlet port side and a similarly situated partial ring 16 on the inlet port side. A guideway is thus formed, but not "grooves formed in the side walls of said housing." The gate is guided in defendant's valve Type B (Plate 3) between the annular shoulder 15 formed by the smaller diameter portion of the welded valve housing on the outlet port side and the larger diameter portion of the inlet port side of the valve housing; which likewise is not "grooves formed in the side walls of said housing." Having the grooves formed in the side walls is an important feature of Smith's valves since, as seen most clearly in Fig. 5 of the patent, the walls of the valve body are not obstructed by protruding rings as in defendant-appellee's valves (D. Ex. D., Plates 2 and 3). In defendant-appellee's valves the rings 15 and 16 in Type A, and the inwardly protruding portions 15 of part 22 and 16 of part 21 in Type B, constrict the passages and create turbulence;

4. Claims 1, 2, 5 and 6 state that the side walls of the inlet side of the valve are provided "at the bottom with cavities connecting with said grooves." These cavities in the bottoms of the side walls and connecting with the grooves are designated by the small letter m in the Smith patent. These recesses are formed into the side walls of the valve as seen most clearly in Fig. 5 of the patent. There is no corresponding structure in either type of defendant's valves. This express limitation is found in each of claims 1, 2, 5 and 6, together with the following statement of purpose thereof, "in which to receive the material scraped off by the gate while

being closed.” The recessing of the side walls in this manner is necessary because the grooves in the unobstructed side walls of the valves provide quiet areas in which deposits build up, and these grooves extend in a straight line from top to bottom of the valve so that considerable deposits are formed. This important element of the claimed combination and its function is not present in either type of defendant’s valves. The Court correctly found that such “cavities” are essential elements of claims 1, 2, 5 and 6, and that these claims were not infringed;

5. Claims 2 and 6 are further limited to “the floor of the inlet side of the housing inclining downward toward the cutting edge of said gate when in closed position.” This element is not present in defendant’s gate Type A. It is present in defendant’s gate Type B;

6. Claims 3, 5 and 6 contain the following limitation: “a transverse wall separating the inlet and outlet ports,” The words “transverse wall” are not found in the specification of the Smith patent. However, it is clear that Smith is referring to the wall portions 1’, as described in page 1, column 2, line 53, and page 2, column 1, line 10 of the patent. This transverse wall is recited *in addition to the grooves formed in the side walls of the valve housing*;

7. Claims 3, 5 and 6 also include the following: “such wall provided with an opening, the gate sliding against said wall, the lower end of said opening formed V-shape,”. Again, no exactly equivalent wording is found in the specification of the Smith patent, but it is certain

that reference is being made to the peculiar formation of the outlet port f as being "V-shaped at the bottom, as at 1," (page 1, column 2, line 50, to page 2, column 1, line 15). No equivalent V-shaped bottom of the outlet port is present in either of defendant's valves. Emphasis is placed on the fact that there are present in these claims the three separate elements of grooves in which the gate is guided, a wall against which the gate slides, and a V-bottomed opening in the wall.

The foregoing conclusions with respect to the meaning of the claims are supported by the phrases found in each of these claims, as follows: "the gate sliding against said wall" and the dual functional statement "whereby said wall supports the gate against the thrust of the pressure of the inlet fluid while the gate is being closed, and the cutting edge of the gate makes relatively an oblique cut through the material located in said opening."

THE COURT'S ERROR

The Court incorrectly decided that the cylindrical outlet port body portions of defendant's valves, being circular in cross-section, were U-shaped at the bottom. *A semicircle is not U-shaped.* The Court erroneously concluded that, since claim 3 was not limited to the "cavities", and since a "V" and a "U" are sometimes interchangeably used in printing and inscriptions (Opinion, R. 21), (Opinion, R. 23), (Finding XII, R. 30), claim 3 was therefore infringed. (Judgment II, R. 35).

The Court erred in broadening the scope of claim 3 and thus finding equivalency, since the Court overlooked the fact that these express limitations were necessary to define over the prior art, and overlooked the abandonment of claims urged during the prosecution of the application which could have been entitled to broader interpretation, and other factors.

THE FILE WRAPPER AND CONTENTS

Claims originally presented by Smith were rejected in the first Office action dated April 15, 1931, on prior art including the patents to Glass, Gill, Atcheson, Hedrick and Mawby (D. Ex. B1, B2, B3, B4, and B5). At the bottom of the first page of the first official action, the Patent Office Examiner made the following statement (D. Ex. A., page 17):

“Claims 6, 7 and 8 are rejected as lacking invention over Gill, who shows the gate guide grooves cut away for the purpose of preventing accumulation of debris, and to use such means on the inlet side would realize no new or unexpected result.”

The original claim 7, rejected above, appears on page 11 of the file and reads as follows:

“7. In a gate valve, the combination of a housing having opposite inlet and outlet ports, a gate located between said ports and slidable in the housing, said gate being beveled on the inlet side at its lower edge, a recess in the floor of said housing on the inlet side of said gate, said recess gradually increasing in depth to said gate and extending laterally whereby the walls of said side groove of the gate are cut away by the recess on the inlet side, and means for operating said gate.”

This claim therefore clearly and definitely defines a structure including the housing, a knife-edged gate guided in the housing, the recess defined by the sloping bottom indicated at J in the Smith patent, and the cavities indicated at m in the Smith patent.

Pursuant to the first Office action, Smith filed an amendment in which he cancelled claims 1, 2, 3 and 6 to 11 inclusive, and added a new series of claims, all of which were limited as in the patent claims. In the argument appended to the first amendment and beginning on page 22 of the file (D. Ex. A), Smith distinguished the structure of the patent application over the prior art. Particular attention is directed to one sentence appearing slightly below the center of page 23, and reading as follows: "Gill shows a semicircular valve seat and obviously there is no scraping action as the gate closes on it." In these words Smith's attorney disclaimed any rights with respect to a gate valve having a semicircular seat at the bottom. The claims are thus expressly limited to a valve having a clearly defined transverse wall in which there is a V-bottomed opening. Moreover, on page 24 of the file the following additional statement was made by Smith: "The patent to Hedrick, 988,777, shows a gate valve having a rectangular opening in which the gate is slidable and, *while the bottoms of the grooves are cut away*, no recess is provided in the floor of the valve housing *nor is the outlet side formed V-shaped at the bottom.*" (Italics ours). Again, Smith's attorney pointed out in no uncertain terms that he was not making any claim to a valve having a round opening on the outlet side of the gate. The significance of the

V-shaped opening is stressed in Smith's specification beginning on page 1, column 2, line 50, and continuing to page 2, column 1, line 10 of the patent. Further than that, Smith, in describing the improvement which he had devised, admitted that gate valves with cylindrical outlet ports were old (patent page 1, column 1, lines 16 to 24). Therefore, even though the arguments presented in behalf of the claims which were finally allowed are overlooked, the fact that Smith cancelled claims readable upon cylindrical outlet ports is overlooked, and the express limitations of the claims and statements of the functions performed by the expressly defined parts are overlooked, the Court is nevertheless clearly in error since the Court's broad interpretation of claim 3 is barred by the positive disclaimer in the specification of the patent.

Claim 3 of the patent expressly stipulates "the lower end of said opening formed V-shaped, whereby said wall supports the gate against the thrust of the pressure of the inlet fluid while the gate is being closed, and the cutting edge of the gate makes relatively an oblique cut through the material located in said opening." In this respect claim 3 of the patent closely resembles original claims 3, 4 and 5 of the application as filed, and which were allowed in the first Office action by the Examiner. Original claims 3, 4 and 5 all refer specifically to the V-shaped bottom on the outlet side of the gate. In order for the original claims 3, 4 and 5 to have been found allowable, they must have recited certain structural features which were not present in the rejected claims which were cancelled. In other words, claim 3 of the

patent depends entirely for its allowability and validity upon the specific stipulation of the transverse wall and the lower surface of the valve outlet opening being formed V-shaped, in addition to any means forming grooves to guide the gate.

TESTIMONY OF THE INVENTOR

Mr. Smith, the inventor, and a witness for plaintiff, testified (R. 77) that his first valves were provided with round outlet openings, and that the pressure of the fluid bowed the gate and caused it to shave the surface of the seat of the valve. He testified that when he made the bottom with a V-shaped section (as disclosed in the patent) there was no wear on the valve seat (R. 78). Mr. Smith admitted that gate valves which he had experimentally built prior to providing the transverse wall and the V-shaped bottom, and which were provided with rectangular gates, were noted to have the gates bowed toward the valve seat and their edges turned (R. 85-87). He testified that there was attrition of the valve seat which was avoided by changing the shape of the opening to a V-shape (R. 87).

COMPARISON OF PLAINTIFF-APPELLANTS' PATENTED VALVE AND DEFENDANT- APPELLEE'S ACCUSED VALVES

The two types of valves manufactured by defendant-appellee are correctly described in Findings of Fact VII and VIII (R. 27, 28). These agreed facts include the

fact that the gates are provided with semicircular, lower ends which are beveled for the purpose of scraping accumulated pulp stock from the face of the seating ledge. This type of valve is admitted by the patentee to be old in the specification of his patent (patent page 1, column 1, lines 16-24), was disclaimed in the prosecution of the patent (D. Ex. A., pages 22-24), and does not present the problem for which Smith was forced to design the transverse wall with the V-bottom opening.

The reason that Smith was forced to provide the transverse wall in addition to the guiding grooves in the sidewalls of the housing, is as follows. The gate in Smith's patent is rectangular. When such a gate is lowered to a point immediately above a straight, horizontal seating ledge in the bottom of the valve, the entire surface of the gate is subjected to the fluid pressure in the conduit. This means that the central portion of the sharp edge of the gate may be bowed considerably toward the outlet side of the valve, resulting in the shaving of the seating ledge and turning of the gate edge about which Smith testified in court (R. 77, 78). Defendant-appellee's gates, on the other hand, being semicircular, and being supported at the sides by circular rings or equivalent, do not present this problem. In such a construction the space between the lower semicircular edge of the gate and the lower semicircular surface of the valve body is a crescent with its points upward and at the same level. This crescent is constantly reduced in size as the gate is lowered. The extent of engagement of the side edges of the gate with the guiding ring increases progressively as the gate is lowered. The unsupported,

lower edge of the gate between the points of the crescent progressively diminishes in width as the gate is lowered. This means that the gate may be brought to its closed position without the ledge being shaved or the lower edge of the gate being turned.

Furthermore, Smith strove for and developed a valve capable of withstanding high pressures, up to 150 pounds per square inch (Smith's testimony, R. 87. See also Smith's testimony, R. 70-72, 77). He later found that such high pressures would rarely be encountered, and in fact the usual pressures were under thirty pounds (R. 87). But the fact remains that the patent was granted on features which Smith developed to withstand high pressures. Defendant's valves, on the other hand, were designed for the usual low pressures. All that defendant did was to rearrange or reassemble desirable features of low pressure gate valves found in the prior art as exemplified by the Gill patent of 1927, the Summers patent of 1921, the Snow patent of 1916, and the Hedrick patent of 1911. The Court was correct in finding that "The defendant's valves are not Chinese copies of the patented structure." (Oral Opinion, R. 22-23). Defendant's witness Thiess testified that valves of the Hedrick patent type were in common use for pulp control as early as 1929 (R. 92, 93) and that such valves had substantially all of the features of the Hedrick valve except the cavities 10 in the side walls (R. 94). This was unrefuted. The use of the cavities of the Hedrick patent was freely open to the public even then because the Hedrick patent had expired in 1928.

Defendant-appellee's valves, therefore, not only do not have structure equivalent to or corresponding to the transverse wall with the V-bottom opening, but have never had any need for such a construction or any equivalent construction. Thus, one of the principal elements upon which the Smith patent was allowed is not present and there is no necessity for its being present. Smith is now trying to assert inclusion within the scope of his patent of the structure which he admitted to be old prior to his patent, and which never did have the problem which he solved in providing the transverse wall with the V-bottom opening.

ARGUMENT

It is axiomatic in patent law that a claim is to be read in connection with the specification, and where the claim uses broader language than the specification, reference may be had to the latter to limit the claim. *Schnitzer et al. dba Alaska Junk Company v. California Corrugated Culvert Company et al.*, C.A. 9 (1944), 140 F. 2d 275. The foregoing decision is also quoted in regard to the following:

“While it is the rule in this Circuit that admissions made by the applicant to the Examiner are not to be used to narrow the scope of his claim *unless he has made changes in his application pursuant to the Examiner's suggestions*, yet the proceedings may be used to aid in construing the claim, (Warren Bros. Co. v. Thompson, 9 Cir., 293 F. 745.)” (Italics ours)

It is believed that the foregoing is true of the practice in the Ninth Circuit as of today. Smith made such changes.

The claim is to be read in connection with the specifications. *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U.S. 403, 432; *American Fruit Growers v. Brogdex Co.*, 283 U.S. 1; *Schriber-Schroth Co. v. Cleveland Trust Co.*, 311 U.S. 211. Where the claim uses broader language than the specifications, reference may be had to the latter for the purpose of limiting the claim. *McClain v. Ortmyer*, 141 U.S. 419; *Magnavox Co. v. Hart & Reno*, 9 Cir., 73 F. 2d 433; *Lanyon v. M. H. Detrick Co.*, 9 Cir., 85 F. 2d 875.

It is directly in point that the Ninth Circuit Court said the following in *Schnitzer et al.*, *supra*:

"The file wrapper contains evidence that the inventor understood this element of his claim in the narrower sense. During the proceedings before the Patent Office, two of the claims were rejected on Anderson, No. 811,812, and the inventor undertook to differentiate Anderson's invention, saying: 'Anderson . . . does not show a packing having a flanged clamp in the sleeve.' Anderson employed a U packing fitted into a seat similar to the one found in Appellants' device."

In the recent Ninth Circuit decision, *Kwikset Locks, Inc. v. Hillgren*, decided February 3, 1954, and reported at 100 USPQ 289 (Advance Sheet), the foregoing principles with relation to infringement received confirmation as follows:

"The District Court further found that the knobs manufactured and sold by Hillgren infringed Kwik-

set's doorknob patent in that they were mere 'colorable variations' and 'mechanical equivalents' of Kwikset's invention. While it is true that a District Court's finding of infringement is generally considered to be a finding of fact that may not be set aside unless clearly erroneous. 'it is [also] well settled that where, as here, there is no dispute as to the evidentiary facts, and the record and exhibits enable us to clearly comprehend the nature both of the process patented and the alleged infringing process, the question of infringement resolves itself into one of law, depending upon a comparison between the two processes and the correct application thereto of the rule of equivalency. The testimony in this case was largely expository and descriptive of the elements and operation of the two processes and was not disputed.' *Kemart Corp. v. Printing Arts Research Lab. Inc.*, 9 Cir., 1953, 201 F. 2nd 624, 627, 628; *United States v. Esnault-Pelterie*, 1938, 303 U.S. 26, 30.

"In the Hillgren knob the edge of the shell does not curl, but rather directly faces the insert. See diagram in margin. Thus the 'curl' or 'annular portion' which is a distinguishing characteristic of the Kwikset knob, is absent from the Hillgren knob. - - - - The Kwikset knob patent is in a crowded field; therefore, its scope must be narrowly limited. Since the Hillgren knob construction is based solely upon the tongue-in-groove principle in such a way as to eliminate the need for spring-back pressure employed in the Kwikset knob to hold the cap in place, we conclude that the Hillgren knob does not infringe the Kwikset patent."

The Court correctly found that gate valves were highly developed in the prior art more than one year prior to the filing of the application which matured into the Smith patent in suit (R. 29); that claims 1, 2, 5 and 6 of the patent in suit are limited to cavities in the side

walls of the body communicating with the grooves, which cavities are not present in either of the valves of the defendant (R. 29); and that the patent was entitled to a very narrow range of equivalents (R. 30). But the Court incorrectly ignored the principles set forth in the above-cited decisions of this Circuit, the United States Supreme Court and other Circuits, in construing claim 3 (R. 30). The entire record of the patent, including cancellation of claims not limited to a transverse wall with a V-bottom opening, the specification of the patent as filed, and the arguments in the amendments, clearly shows that Smith understood his claims to be limited strictly to a V-shaped opening in a transverse wall, in addition to any means forming grooves at the sides. The transverse wall with its V-bottom opening, is an element entirely lacking from defendant-appellee's valves, equivalent structure is not present in defendant-appellee's valves, and there is no need for such structure since its function is not necessary. Accordingly the finding of the Court with respect to claim 3 is clearly erroneous and should be set aside.

DAMAGES

Finding of Fact XII expressly acknowledges that ordinarily the Court would consider other contracts entered into by the claimants as a proper standard upon which to determine a reasonable royalty. The Court, however, set a very low royalty "in view of the facts hereinbefore set forth and the fact that the patented structure represented only a minor improvement in a

highly developed art" (R. 30). This is likewise a finding that may not be set aside unless clearly erroneous. Defendant-appellee contends that the Court's statement that the patented structure "represented only a minor improvement in a highly developed art" is correct, and therefore the finding of infringement with respect to claim 3 should be set aside. Nevertheless, in the event that the finding of infringement is sustained, defendant-appellee believes that the Court was clearly within its rights in setting the rate of damages, and the amount of damages should not be disturbed. *Uihlein v. General Electric Co.* (C.C.A. 7), 47 F. 2d 997; *Horvath v. McCord Radiator and Manufacturing Company et al.* (C.C.A. 6), 100 F. 2d 326, c.d. 308 U.S. 581, 84 L. Ed. 486.

Although there is some evidence of higher royalties being specified in previously granted licenses, the evidence is to the effect that the royalty was not uniform, and therefore the established royalties cannot be used as a basis to prove damages. *Rude v. Westcott*, 130 U.S. 152, 167. A single license is not sufficient to establish a royalty, because one purchaser may give a larger sum for a license than he or any other person could well afford to pay, whereas such a business error is not likely to be made by a considerable number of persons when buying licenses under the same patent. The unanimous acquiescence of a considerable number of men in a particular royalty is evidence of its substantial justice, while the acquiescence of one only of the same men would have no convincing force. *Muther v. United Shoe*

Machinery Co., 21 F. 2d 773, 775. *Walker on Patents*, Deller's Edition, Section 823.

Furthermore, the efforts of plaintiffs-appellants to show that there were three licenses at five per cent (5%) of the total sales price of the gate valves were misleading, there being actually only one license under the United States patent at that royalty rate, namely the license to Crane Company of America at Chicago, Illinois. The license to Crane Company of Canada at Montreal, Canada, should be considered as part of the same transaction since the two are related companies, and in any event should not be considered as establishing a uniform royalty by two licenses under the United States patent since the license was limited to Canada. The fact that Western Machinery Company of Portland, Oregon, also apparently agreed to pay five per cent royalties is not to be taken as establishing two United States licenses at five per cent, since the five per cent royalty is only part of a twelve and one-half per cent charge imposed on Western Machinery Company, of which five per cent was stated to be for patent royalties and seven and one-half per cent stated to be for rental of drawings, patterns, specifications and other data applicable to the manufacture of gate valves. It is quite usual for licensors to grant the right to use drawings, patterns, specifications and other data, but usually there is no division of the royalty into so much for patent royalty and so much for rental of the latter items. At best, the situation is established that there were two effective licenses under the patent in suit, one specifying five per cent royalties and the other specifying twelve

and one-half per cent royalties, and these licenses furthermore were limited to different parts of the country.

Ordinarily the requirement of uniformity excludes from consideration all such licenses as were given at variant rates, for no better reason than variant ability on the part of the licensees to negotiate for a license or to resist a suit for infringement. *United Nickel Co. v. Railroad Co.*, 36 Fed. 186, 190. In *American Sulfito Pulp Co. v. De Grasse Paper Co.*, 193 Fed. 653 (C.C.A. 2) the lowest royalty was arbitrarily adopted as the basis of damages, and in *Horvath v. McCord*, supra, the Court arbitrarily set a rate lower than the proven uniform rate.

PLAINTIFF-APPELLANTS' BRIEF

Defendant-appellee has carefully read the brief of plaintiffs-appellants and believes that the foregoing completely meets and answers every bona fide argument advanced therein. Attention is called to the attempt therein to distort terms used in the claims to read on the accused valves (pages 10-11), and the statement on page 10 that "Defendants' gate valve bonnetless type B is substantially a Chinese copy of the Smith valve." The facts are otherwise, as the lower Court expressly found (R. 22-23).

Also, plaintiff-appellants' attempted distortion of the Smith patent relative to the cavities m in the side walls (Brief pages 26-28) is clearly refuted by Fig. 5 of the Smith patent.

Attention is also called to plaintiff-appellants' efforts, in pages 16-20 of the Brief, to create the impression that the patent actually covers something other than it does. Contrary to pages 16 and 17, gate valves in which pressure seated the valve on the outlet side were long known (Hedrick patent), and which had knife edges (Brooks patent). Where, in the patent claims, is there any reference to the length of the gate valve, or stuffing boxes, or bonnets, as described in page 19? And no mention is made of several express limitations of the claims, such as, for example, "opening formed V-shape."

In fact the brief, very significantly, discusses the *objects* of the patent, advantages of the valve *illustrated* in the patent, and portions of the *specification* of the patent; but *does not advance a solitary argument based upon the claims of the patent*. *Schnitzer et al. v. California Corrugated Culvert*; *Warren Bros v. Thompson*; *Carnegie Steel v. Cambria Iron*; *American Fruit Growers v. Brogdex*; *Schriber-Schroth v. Cleveland Trust*; all *supra*.

CONCLUSIONS

1. The Court was clearly erroneous in finding infringement of claim 3, and this finding should be set aside;

2. The Court was clearly correct in finding non-infringement of claims 1, 2, 5 and 6, and this finding should be sustained;

3. In the event that infringement is found, the findings of the Court as to the amount of damages should not be disturbed.

Respectfully submitted,

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